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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD NIXON,
Petitioner,

v.

GERALD P. CARMEN, Administrator
General Services Administration, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

(1) Whether the Administrator of General Services may grant direct public access, at regional listening centers, to tape recordings of private presidential conversations conducted within the Oval Office, and refuse to give "serious consideration" to less intrusive means of implementing the Presidential Recordings and Materials Preservation Act.

(2) Whether, notwithstanding the existence of alternative, less intrusive methods for distinguishing between private and official entries, the staff of the National Archives may review, word-by-word, the recorded diary entries of former President Nixon in order to determine whether the entries constitute "private or personal" material within the meaning of the Presidential Recordings and Materials Preservation Act.

(3) Whether petitioner was entitled to discovery on issues which this Court, in *Nixon v. Administrator,* 433 U.S. 425 (1977), deemed relevant to determining the validity of the Act's implementing regulations.

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OPINIONS BELOW

The decision of the Court of Appeals (Pet. App. A, pp. 1a-39a, *infra*), issued on February 9, 1982, is reported at 670 F.2d 346 (D.C. Cir. 1982). The orders of the District Court, issued without opinion or memorandum, are reproduced at Pet. App. C, pp. 41a-43a, *infra*.

JURISDICTION

The decision of the Court of Appeals was issued on February 9, 1982. A timely petition for rehearing was denied on March 24, 1982. Pet. App. B, p. 40a, *infra*. On

June 16, 1982, the Chief Justice extended the time within which to file a petition for writ of certiorari to and including August 6, 1982. Pet. App. D, p. 44a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

(1) The Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 n. (1976), is set out in its entirety at Pet. App. E, pp. 45a-52a, *infra*.

(2) Section 105-63.404 of Title 41, Code of Federal Regulations, governing public access to the presidential tape recordings is set out in its entirety at Pet. App. E., pp. 52a, *infra*.

(3) Section 105-63.104(b) of Title 41, Code of Federal Regulations, defining "private or personal materials," and Section 105-63.401-2(a) of Title 41, Code of Federal Regulations, governing the review and segregation of "private or personal materials," are set out in their entirety at Pet. App. E, p. 53a, *infra*.

STATEMENT

In *Nixon v. Administrator*, 433 U.S. 425 (1977), this Court upheld as facially constitutional the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 n. ("the Act"), which authorized government seizure and review of all the tapes and papers of Mr. Nixon's presidency. In doing so, the Court noted that the Act required that "in designing the regulations, the Administrator must consider the need to protect the constitutional rights of appellant and other individuals against infringement by processing itself or, ultimately, by public

access to the materials retained." 433 U.S. at 436. Concurring, Justice Powell observed that, because the processing and access regulations had not yet been promulgated, "[t]he difficult constitutional questions lie ahead." 433 U.S. at 503. In particular, Justice Powell noted that (433 U.S. at 504; emphasis added):

> The Court's discussion of the interests served by [the Act] should not foreclose in any way the search that must yet be undertaken for means of assuring eventual access to important historical records *without infringing individual rights protected by the First, Fourth, and Fifth Amendments.*

The courts below ignored these warnings and sustained the validity of a GSA regulation that authorizes the use of regional listening centers throughout the country at which the general public can have direct access to the closed-door conversations between a President and anyone with whom he spoke, regardless of their reasonable expectations of privacy, so long as their conversation did not involve purely "private" topics, security classified information, or other narrowly limited categories exempt from disclosure by regulation.[1] The judgment below also authorized

[1]The regulations admittedly provide that conversations dealing with strictly private or personal topics will be returned to Mr. Nixon. However, the definition of "private" restricts this category to conversations relating "solely to a person's family or other non-governmental activities." § 105-63.104(b). Thus, any discussion having to do, for example, with the former President's views of other political figures are not to be treated as private. With regard to all non-personal topics, the regulations provide that such conversations will be withheld from public listening for a period of time if they deal with (a) trade secrets, (b) security classified information, or (c) material that is libelous of a living person or that would constitute a clearly unwarranted invasion of personal privacy. (41 C.F.R. § 105-63.402-1(a), 41 C.F.R. § 105-63.402-2(b)) Conversations between the President and his advisors concerning all other general political and governmental topics,

archivists to conduct word-by-word reviews of former President Nixon's dictated diaries before returning them to him, notwithstanding this Court's expressed concern over intrusion into Mr. Nixon's personal privacy, which resulted in the directive that the Administrator return the the diaries promptly once they are identified. 433 U.S. at 459 n.22; *see also* 433 U.S. at 487-88 & n. (White, J., concurring); 433 U.S. at 496 n.2 (Powell, J., concurring).

These two significant issues were decided on an inadequately developed record following the district court's denial of important discovery requested by petitioner. The district court's discovery rulings deprived the court of appeals and this Court of the very information this Court cited in *Nixon v. Administrator,* 433 U.S. at 448-452, as necessary to a resolution of the merits of the issues raised here for review.

(1) Proceedings in the District Court

Following this Court's decision in *Nixon v. Administrator, supra,* petitioner filed the original complaint in this suit challenging the validity of certain regulations pertaining only to the processing of his materials. Portions of those regulations were thereafter revised to accommodate some of Mr. Nixon's claims. Mr. Nixon then filed an amended complaint challenging remaining aspects of the regulations and he sought discovery from, *inter alia,* the Administrator and the Archivist of the United States concerning the proposed handling of the presidential materials. The Administrator immediately moved for a

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such as strategies on legislative initiatives, will not be restricted unless Mr. Nixon successfully asserts a particularized claim of privilege. In sum, the regulations provide more solicitude for trade secrets and commercial information than they do for a President's confidential conversations.

protective order, and the district court barred *all discovery* pending its ruling on the Administrator's motion to dismiss or for summary judgment.

The public access regulations were submitted thereafter to both Houses of Congress for approval. After they became effective, Mr. Nixon then amended his complaint a second time to challenge them. The Administrator – *conceding* that the content of the public access regulations had been influenced by congressional action – admitted they were unconstitutional because adopted under the one-house congressional veto procedure. After more than a year of negotiations, the parties settled all of Mr. Nixon's claims except those involving (a) word-by-word review by archivists of Mr. Nixon's personal diaries, and (b) 41 C.F.R. § 105-63.404(c), pursuant to which the Administrator will create regional listening centers throughout the country for direct access by the general public to the presidential tape recordings.[2]

Petitioner then filed a third amended complaint covering the two unresolved issues. However, faced with the district court's previously imposed – and still outstanding – order prohibiting *all* discovery, Mr. Nixon sought, and was granted, leave to serve a limited number of requests for admissions, interrogatories and a document demand upon the Administrator. Among other things, he sought information concerning the position of the White House on the proposed dissemination of the White House tapes through regional centers in order to learn whether the incumbent

[2]Although the Administrator conceded the unconstitutionality of the regulations because they were promulgated under the one-house veto provision, Mr. Nixon agreed, *inter alia*, not to assert that as a basis for invalidating the regulations in exchange for the Administrator's agreement to make other revisions in the processing and public access regulations.

President was even aware of the regulation, much less approved of it.

The Administrator refused to respond to the document demand as to any materials within the possession of the White House personnel concerning White House input regarding alternative proposals for public access to the presidential tape recordings. Mr. Nixon thereafter noticed the deposition of White House Counsel Robert Lipshutz on the Administrator's motion, the district court quashed the deposition.

Nearly a month later, the Administrator cross-moved for summary judgment and submitted an affidavit containing numerous factual assertions by a Deputy Assistant Archivist. Mr. Nixon asked for leave to depose the affiant, or his supervisor, the Archivist, and to develop information relating to the archival handling of the tapes of Presidents Kennedy and Johnson. Such information would have shed considerable light on the affiant's statements and the issues before the court. In keeping with its prior rulings, the district court again blocked petitioner's attempt to develop a complete record. Notwithstanding an offer of proof from Mr. Nixon concerning factual matters that he would establish if afforded the opportunity, the district court, in a one-page order, granted summary judgment for the Administrator. Pet. App. C.

(2) The Court of Appeals' Decision

The court of appeals affirmed. It rejected the contention that dissemination of White House tapes through regional listening centers violates Mr. Nixon's personal rights of privacy and political association under the Fourth and First Amendments, on the ground that a Presi-

dent has a privacy interest *only* in those conversations where the *content* consists of non-governmental, personal topics. In the court's view, "Mr. Nixon while President could have had such an expectation [of privacy] in some materials, such as diaries or other communications respecting personal matters unrelated to his public duties, but not in materials relating to the conduct and official duties of the Presidency"(citations omitted). Pet. App. A at 15a-16a. The court viewed Mr. Nixon's political and associational rights as limited to conversations having only to do with "partisan politics," which are to be restricted by regulations from public access. Pet. App. A at 17a. Thus all discussions of "politics" as that term applies to the vast majority of a President's discussions were deemed not deserving of protection from public dissemination.[3]

The court also rejected Mr. Nixon's claim that public listening centers unwarrantedly infringe on the Presidential privilege of confidentiality, on the ground that Mr.

[3]The extremely narrow construction to be given the category "private political" is reflected in the examples of "private political" versus "public political" items used in the Archivists' Manual. One example from the manual, a portion of which was placed in the Appendix before the court of appeals, is:

> "The archivist uncovers a memorandum to the President in which a staff member analyzes the substance of and suggests prospective responses to a speech delivered the previous day by Democratic Presidential nominee George McGovern on the Viet Nam situation.
>
> Conclusion: This memorandum falls within the scope of Presidential historical materials and must be retained for further processing.
>
> Rationale: Although produced in the context of a Presidential campaign, the existence of the memo suggests the potential exercise of Presidential powers or duties as a campaign strategy. In effect, the memo evidences a direct relationship between the Presidential campaign and the potential conduct of the President's powers as Commander-in-Chief."

Nixon retains the opportunity to assert such privilege on a conversation-by-conversation basis. Recognizing that "[t]he opportunity to challenge particular disclosures, of course, does not guarantee that whatever access is eventually allowed will have no adverse effect on the Presidential privilege of confidentiality", Pet. App. A at 20a, the court nonetheless discounted the "seriousness" of this adverse effect because President Carter, whose position on the regulation Mr. Nixon had been barred from discovering, had not challenged the regulation on this ground, and because the privilege "erodes with the passage of time" and none of these taped conversations will be released until "at least eight years after the event disclosed." Pet. App. A at 20a.

On the issue of the diary review, the court concluded that archival reliance on the "trigger phrases" Mr. Nixon used to preface his diary dictations might result in "unreliable or incomplete identification." Because there is "no single trigger phrase," and because his earliest diary dictations are marked by the absence of any addressing phrase, the court did not "view as unreasonable the archivists' insistence upon not being restricted to that alleged identifying feature." Pet. App. A at 34a-35a.

Finally, the court of appeals sanctioned the district court's severe limitations on Mr. Nixon's attempted discovery. It said that the first order blocking petitioner's discovery efforts came before the filing of the operative amended complaint, that the second prohibition came after petitioner had filed his motion for partial summary judgment, and that the third came after all cross-motions for summary judgment had been filed. Pet. App. A at 37a-38a. The court omitted from this sequence the fact that the second prohibition stemmed from petitioner's ef-

fort to force the government to produce documents it had withheld in response to a request for production of documents filed *before* the summary judgment request, and that the third and final bar was imposed in reply to petitioner's effort to depose a witness whose affidavit the Administrator had relied upon in his cross-motion for summary judgment. In any event, the court also concluded that no matter what information Mr. Nixon's discovery might have elicited, it would not have changed its opinion as to the validity of the regulations. Among other things, the court stated that "[t]he constitutionality *vel non* of the public access regulation does not turn on the methods by which materials accumulated during prior Presidential terms were stored and made available to the public." Pet. App. A at 39a.

REASONS FOR GRANTING THE WRIT

1. Conceding that he had never given "serious consideration" to any less restrictive alternative, the Administrator adopted a regulation permitting direct public access to petitioner's White House tape recordings at listening centers around the country. The tapes span approximately two and a half years of Mr. Nixon's presidency. The Administrator's obligation to preserve his right of privacy, accord appropriate weight to the Presidential privilege of confidentiality, and protect his right of political association under the First Amendment, requires that "serious consideration" be given to some alternative mode of public dissemination of the information on the recordings. Based on suggestions first advanced by the three-judge district court that upheld the Act, *Nixon v. Administrator,* 408 F. Supp. 321 (D.D.C. 1976) and later espoused by Members of this Court in affirming that decision, 433 U.S. at 496, Mr. Nixon proposed several alter-

natives that would have fully accomplished the Act's goals while impinging far less on his specified rights and privileges, as well as the rights and privileges of others.

In holding that Mr. Nixon's claim of privacy could only pertain legitimately to those conversations in which the *content* consisted of non-governmental, personal topics, the court below departed abruptly from this Court's rulings that the right of privacy is defined not by the content of what is said but by the circumstances under which it is expressed. *See United States v. Payner,* 447 U.S. 727, 731 (1980); *Rakas v. Illinois,* 439 U.S. 128, 143 (1978); *Katz v. United States,* 389 U.S. 347 (1967). This Court has explained that "the Fourth Amendment protects people," and that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v. United States, supra,* 389 U.S. at 351-52. *See United States v. Chadwick,* 433 U.S. 1, 7 (1977).

The recordings at issue here were made in Mr. Nixon's office, with the door shut behind him, under the same conditions in which Presidents Kennedy and Johnson had maintained the confidentiality of their recorded conversations. Consequently, Mr. Nixon had a reasonable expectation of privacy and was entitled to conduct his personal *and* business affairs within a "zone of privacy" out of the public's view or hearing.

The court of appeals provided no authority[4] for the pro-

[4]The court's determination that the Presidential tape recordings of "non-personal" discussions do not warrant privacy protection constitutes circular reasoning. According to the court, "[s]uch materials are deemed nonprivate precisely because of the public's traditional interest in and eventual access to them." Pet. App. A at 17a. In other words, the public is entitled to access (and the President has no privacy) because the public has an interest in having access. Of course,

position that the President is entitled to no privacy when he retreats behind the doors of the Oval Office to discuss with a Congressman, or a private citizen, or a staff member their ideas concerning potential legislation, a pending election, the menu for a state dinner, or the conditions of the country generally. This brushed aside Justice Powell's observation in *Nixon v. Administrator,* 433 U.S. at 504, that "even in the councils of Government an individual 'has a legitimate expectation of privacy in his personal communications.'"

If the court of appeals is correct that "the public trust" historically attaching to high office, and the mere "assumption of a public role" are sufficient to deny a person's expectation of privacy, (*see* Pet. App. A at 16a), then no President (or Member of Congress, for that matter) could preclude based on grounds of privacy the press or any member of the public from prying behind his or her closed office doors. The lower court has held that any expectation of privacy for such closed-door conversations is unreasonable if a person is involved in government business and the conversations are not strictly covered by a particular privilege. Such a proposition is far-reaching and should not be upheld by this Court.

Moreover, the court of appeals' decision constitutes a retroactive and factually unsupportable finding as to the reasonableness of Mr. Nixon's expectation of privacy. At the time he recorded his Oval Office conversations, at least four prior Presidents had done likewise. When each of

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the court conveniently ignored the fact – since it was not in the record and it refused to permit Mr. Nixon to gather evidence on the point – that no member of the public *ever* has had access to the recordings of four prior Presidents.

them left office, he or someone acting on his behalf controlled the manner in which his conversations would become public. The court of appeals could not conclude that Mr. Nixon's expectation of privacy was unreasonable without conflicting with President Johnson's 50-year ban on even the *government's* access to his tape recordings, and the control President Kennedy's family and friends have to this day over the disclosure of President Kennedy's tape recorded conversations.

The court of appeals also failed to give weight to the Presidential privilege of confidentiality. As this Court made plain in *United States v. Nixon,* 418 U.S. 683, 715 (1974):

> The need for confidentiality [for a President] even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment.

Operating jointly with petitioner's privacy and political association rights, this privilege necessarily heightens the constitutionally-protected interests at stake in this case. Nonetheless, the court of appeals approved the Administrator's refusal to restrict public access to the materials.

The court below suggested that by proposing alternatives for public access to information contained in the recordings, Mr. Nixon undercut his claim that direct public access to the tapes infringes his rights. The court misapprehended the import of the suggested alternatives. Justice Powell's concurrence in *Nixon v. Administrator,* 433 U.S. at 498, indicates that direct access by the public to the tapes themselves constitutes the most significant intrusion upon the rights of the former President and others. At the

same time, it notes that certain legitimate objectives warrant some intrusion on those rights. Deferring direct public access for a period, such as the life of the participants in the conversations, or substituting written synopses or even transcripts for the recordings themselves, advances the Act's legitimate objectives without unduly encroaching upon the rights of the conversants.[5]

Finally, in deprecating Mr. Nixon's contention that the regulation fails adequately to safeguard the rights and privileges he claims, the court of appeals found comfort in the "incumbent's [President's] failure to mount a similar challenge at the time Mr. Nixon brought this suit. . . ." Pet. App. A at 20a. But the district court banned from the record any effort to discern the incumbent's position concerning the legitimacy of this regulation. Mr. Nixon

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[5]The court below failed to give any consideration to the fact that public access to actual voice recordings is a greater intrusion on one's privacy than dissemination of transcripts. A public official, simply because he is a public official, does not forfeit his right to express his private feelings in a confidential setting. A public decision and an official's implementation of that decision may be subject to public scrutiny. But the manner and tone of his personal expressions, purposely undertaken in the privacy of his office, remain a personal and private moment to him. There is no "public trust" that attaches, for example, to the decibel level of an official's expressions made in confidence, and there is no evidence in the record that any public official has ever expected that such aspects of his private expressions would be published to the world. The court's decision failed to analyze what, if any, "public trust" attached to such things as voice inflections of participants in confidential conversations. Instead, it focused solely on the *content* of the conversations.

sought it through discovery, but he was blocked by the district court.[6]

In order to uphold the validity of this regulation, the court of appeals was forced to deviate significantly from the Fourth Amendment decisions of this Court and to ignore the teachings of two decisions by this Court regarding the presumptive quality of the Presidential privilege of confidentiality. In order to correct the lower court's rulings on these points, the Court should issue a writ of certiorari.

2. In *Nixon v. Administrator,* 408 F. Supp. 321, 357 (D.D.C. 1976), the three-judge court expressly found that Mr. Nixon's diaries "fully implicate privacy concerns" deserving constitutional protection, and should be returned promptly to Mr. Nixon pursuant to the Act. The Solicitor General represented to this Court during oral argument that these diary entries in fact would be returned to Mr. Nixon "once it was identified." 433 U.S. at 490 n. The unlimited archivist discretion, including word-by-word review, proposed by the Administrator for identify-

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[6]The court held that the Presidential privilege of confidentiality is fully protected under the regulations because it can be asserted on a conversation-by-conversation basis and that this does not place an impermissible burden on Mr. Nixon. In its view, "[w]hether particular material [*i.e.,* conversations] implicates the privilege depends on whether disclosure will affect the flow of executive discussion, a complex judgment best made by the incumbent President," and that given "the incumbent's superior ability to perceive threats to the privilege, . . . the Executive Branch may well raise a challenge when such threats appear, thereby alleviating Mr. Nixon's burdens." Pet. App. A at 27a-28a. This *assumption,* for which the court below again had no basis other than pure surmise, reflects a less than informed understanding of the incumbent's responsibilities. To suggest that the incumbent will have the time or inclination to review the Nixon White House tapes on a conversation-by-conversation basis to decide whether to assert the confidentiality privilege is fanciful.

ing these recordings, however, impermissibly intrudes upon the very rights this Court sought to protect. It also overlooks less intrusive means for implementing the goals of the Act.

The court of appeals concluded that there were only two alternatives for identifying Mr. Nixon's diaries: either the "triggering phrase" method proposed by Mr. Nixon[7] could be used, or the archivists would have unlimited discretion to review the diaries in whatever manner they deem necessary, including word-by-word review. Having framed the issue this way, the court chose the latter because, in its view, the Administrator might not be able to identify all diary entries by use of the "triggering phrase" method. The court ignored a third, less intrusive possibility: use of the "triggering method" whenever it fulfills the task, with access to such portions of the dictation as are necessary to determine its character only when the "triggering phrase" method is actually inadequate.

Neither the Administrator nor the courts below considered this alternative. The court of appeals could not assume that the archivists would not abuse an unlimited discretion by listening to the recordings more than is necessary to identify them. *See Couch v. United States*, 409 U.S. 322, 350 (1973) (Marshall, J., dissenting). The

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[7]Mr. Nixon had explained in an affidavit in the district court that he began his personal and official dictation with different "triggering phrases." A dictation relating to official business generally would be preceded by a direction as to whom the memorandum was addressed. His diary dictation, however, was addressed to no one, was commenced on a new dictabelt, was not commingled with non-diary dictation, and generally was introduced by a phrase such as "eleven twenty-five; December eight. I called . . . ," or "March 9, 1972, Memorandum for the private file — not to be transcribed," or "this is the second tape dictated for file, not to be transcribed — at Camp David on Saturday afternoon, January 6, 1973."

Administrator and the archivist in charge of the Nixon materials project gave assurances that the proposed review would be limited to the extent "necessary to ascertain whether the dictabelt or tape constitutes a personal diary." But the Administrator pointedly refused to adopt regulations that would limit the archivists' discretion, either along the lines suggested by Mr. Nixon, or by forbidding word-by-word review.

3. In *Nixon v. Administrator, supra,* this Court highlighted two areas of factual inquiry essential to the resolution of Mr. Nixon's claims that eventual public access under the Act, as applied, violated the constitutional rights of the former President and of others. The first related to the impact of the challenged action on Presidential privilege, as viewed by the incumbent President (433 U.S. at 448-449); the second concerned the historical practice of other former Presidents and the expectations that have been created as a result of their experience (433 U.S. at 450-452). Mr. Nixon was denied discovery into both areas. The court of appeals not only upheld this curtailment of discovery, but proceeded *to rely* upon certain assumptions concerning those very factual areas, without support in the record and contrary to what Mr. Nixon had offered to prove through his attempted discovery. As a result, the claims now before this Court depend upon a factual record that petitioner was not permitted to develop.

This Court has emphasized the view of the incumbent President on the question of Presidential privilege. President Ford's approval of the Act and the Carter Administration's defense of its facial constitutionality were cited to refute Mr. Nixon's claims that the Act would harm the functioning of the Executive Branch. *See, e.g., Nixon v. Administrator,* 433 U.S. at 449 ("the incumbent President is vitally concerned with and in the best position to assess the present

and future needs of the Executive Branch, and to support invocation of the privilege accordingly"). Mr. Justice Powell underscored the significance of this point when he stated (433 U.S. at 503-504):

> The President no doubt will see to it that the interests in confidentiality so forcefully urged by The Chief Justice and Mr. Justice Rehnquist . . . are taken into account in the final regulations . . . . While the incumbent President has supported the constitutionality of the Act as written, there is no indication that he will oppose appellant's assertions of Presidential privilege as they relate to the rules that will govern the screening process and the timing of disclosure, and particularly the restrictions that may be placed on certain documents and recordings.

Despite this Court's pointed interest in the incumbent's views, Mr. Nixon was prohibited from asking the President's counsel for the incumbent's assessment of the impact of the general public's access to the tapes. Indeed, the court of appeals even relied upon the incumbent's failure to join in Mr. Nixon's claim as tending to weaken the force of that claim, Pet. App. A, at 20a, a conclusion that assumes that President Carter was aware of the regulation and had decided that its impact did not warrant legal or administrative challenges. Yet Mr. Nixon sought to disprove these assumptions by showing that the incumbent President had not been briefed concerning the regulation and that his White House Counsel opposed it.

Also important to this Court was the historical practice regarding the processing and release of records belonging to prior Presidents, which was relevant to assess the reasonableness of Mr. Nixon's expectation that the recordings of his Presidential conversations would be protected under

the Fourth Amendment. *See Nixon v. Administrator, supra,* 443 U.S. at 445-450. Indeed, the Court in *Nixon v. Administrator,* contemplated the possibility that restrictions on access might be promulgated (433 U.S. at 497):

> . . . consistent with traditional restrictions placed on access to Presidential papers, and that such restrictions could forbid public disclosure of any confidential communications between appellant and his advisors for a fixed period of years, or until the death of Mr. Nixon and others participating in or the subject of communications.

Mr. Nixon attempted to depose the Archivist and the Deputy Assistant Archivist (on whose affidavit the government and the lower courts relied) regarding archival restrictions on the tape recordings of Presidents Kennedy and Johnson, but he was barred by the district court from developing this factual area. While upholding the ban on discovery, the court of appeals relied on "facts" not in the record relevant to the precise issue to support its decision. Responding to Mr. Nixon's Presidential privilege argument, the court of appeals stated that "even more damaging" is the fact that the privilege "erodes with time" because "there has never been an expectation that the confidences of the Executive Office are absolute and unyielding." Pet. App. A, 20a, *infra.* This statement, however, does not pertain to the confidential recordings of four other Presidents. In view of this Court's and the lower courts' apparent view of the importances of this factual area, Mr. Nixon should have had an opportunity to develop the factual record, rather than have his claims resolved on assumptions for which no factual support exists.

In *Public Affairs Associates, Inc. v. Rickover,* 177 F.Supp. 601 (D.D.C. 1959), *aff'd in part,* 284 F.2d 262 (1960), *rev'd and remanded,* 369 U.S. 111 (1962), *on remand,* 268 F.Supp. 444 (D.D.C. 1967), which involved the question of ownership of government-related papers, this Court remanded the case because the lower court, as here, had granted summary judgment without fully developing the record. This Court already has explicitly cited the kinds of factual information it believed relevant to determining the validity of the regulations under attack. Yet Mr. Nixon pointedly was prevented from obtaining such information. Given the historical precedent that these regulations will establish, and the importance of the rights and privileges at stake in this case, Mr. Nixon's claims may not be rejected on their merits without a fully developed factual record. Moreover, because archival processing of the Presidential materials has continued unabated throughout the pendency of this case, no interest will be jeopardized if this Court were now to remand the case to permit additional discovery. At minimum, such additional discovery will provide a more thorough factual setting in which to consider the issues raised in this case.[8]

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[8]Another area that would be an appropriate subject for further inquiry concerns the National Archives' ability to assure the security of the tape recordings if played at regional listening centers. While this case was pending below, the Archives began permitting the public to listen to the Watergate trial tapes at a reference room in the National Archives. Sometime after that practice commenced, Mr. Dick Tuck played for the news media copies of portions of those conversations, but refused to identify the source from which he obtained the recordings. The National Archives does not know whether Mr. Tuck surreptitiously re-recorded the tapes played in its reference room. Further discovery will explore whether and what security precautions the Archives contemplates in order to guarantee that its airing of hundreds of hours of Presidential conversations in regional listening centers will not pose a significant risk that multiple copies – inevitably to be commercially reproduced – will not be made.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted and the case should be set for plenary review, or the decision of the court of appeals should be vacated and the case remanded to the district court for further development of the facts.

Respectfully submitted,

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